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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

ASGROW SEED COMPANY,
v. *Petitioner,*

DENNY WINTERBOER and BECKY WINTERBOER,
d b/a DEEBEES,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

	Page
I. THE ONLY SEED THAT CAN BE SOLD UNDER SECTION 2543 IS THE LIMITED QUANTITY THAT WOULD BE NEEDED TO PRODUCE ANOTHER CROP ON THE SELLER'S FARM	1
A. The Limit On The Amount Of Seed That Can Be Sold Under Section 2543 Is Set By The First Half Of The First Sentence Of The Section	3
B. The Conditions Under Which "Such Saved Seed" Can Be Sold Under Section 2543 Are Set By The Proviso In The First Sentence....	5
C. The Term "Marketing" In Section 2541(3) Must Be Given Its Ordinary Meaning Which Includes All Acts Of Selling	6
D. Section 2543 Only Limits The Amount Of Protected Seed That Can Be Sold For Reproductive Purposes	7
E. There Are No Prior Interpretations Of Section 2543 To Which This Court Owes Deference	9
F. The Respondents' Other Attempts To Avoid Liability Are Irrelevant	11
G. The Policy And Constitutional Challenges To The PVPA Are Misplaced And Meritless..	13
II. THE NOTICE PROVISION IN SECTION 2541(6) IS APPLICABLE TO ALL SALES OF PVPA SEED PERMITTED UNDER SECTION 2543	14
A. Congress Only Exempted Sales When It Provided That It Shall Not Infringe Any Right To Sell Such Saved Seed	15

TABLE OF CONTENTS—Continued

	Page
B. Congress Did Not Allow Or Intend For Any Protected Seed To Be Used To Produce A Hybrid Or Different Variety	17
C. Section 2543 Should Be Narrowly Construed To Further Congress' Purpose Of Requiring Notice In All PVPA Seed Transactions.....	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
<i>A.H. Phillips, Inc. v. Walling</i> , 324 U.S. 490 (1945)	18
<i>Asgrow Seed Co. v. Kunkle Seed Co.</i> , No. 86-3138-A (W.D. La. 1987), <i>aff'd</i> , 845 F.2d 1034 (Fed. Cir. 1988)	9
<i>Campbell v. Acuff-Rose Music, Inc.</i> , 114 S. Ct. 1164 (1994)	1
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979)	10
<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989)	18
<i>Demarest v. Manspeaker</i> , 498 U.S. 184 (1991)	10
<i>Eli Lilly & Co. v. Medtronic, Inc.</i> , 496 U.S. 661 (1990)	1
<i>Federal Election Comm'n v. Democratic Senatorial Campaign Comm.</i> , 454 U.S. 27 (1981)	11
<i>Freytag v. Commissioner</i> , 111 S. Ct. 2631 (1991) ..	16
<i>Hallstrom v. Tillamook County</i> , 493 U.S. 20 (1989)	18
<i>In re Snyder</i> , 472 U.S. 634 (1985)	14
<i>Keene Corp. v. United States</i> , 113 S. Ct. 2035 (1993)	17
<i>Laitram Corp. v. Cambridge Wire Cloth Co.</i> , 863 F.2d 855 (Fed. Cir. 1988), <i>cert. denied</i> , 490 U.S. 1068 (1989)	12
<i>Perrin v. United States</i> , 444 U.S. 37 (1979)	7
<i>Robertson v. Seattle Audubon Society</i> , 112 S. Ct. 1407 (1992)	13
<i>Schneidewind v. ANR Pipeline Co.</i> , 485 U.S. 293 (1988)	10
<i>Shamrock Technologies, Inc. v. Medical Sterilization, Inc.</i> , 903 F.2d 789 (Fed. Cir. 1990)	12
<i>United Parcel Service, Inc. v. Mitchell</i> , 451 U.S. 56 (1981)	14
<i>United States Nat'l Bank v. Independent Ins. Agents of America, Inc.</i> , 113 S. Ct. 2173 (1993) ..	4
<i>United States v. Frame</i> , 885 F.2d 1119 (3d Cir. 1989), <i>cert. denied</i> , 493 U.S. 1094 (1990)	14
<i>United States v. Morton</i> , 467 U.S. 822 (1984)	2
<i>United States v. Nordic Village, Inc.</i> , 112 S. Ct. 1011 (1992)	16
<i>Wickard v. Filburn</i> , 317 U.S. 111 (1942)	14

TABLE OF AUTHORITIES—Continued

Statutes	Page
7 U.S.C. § 2326	9
7 U.S.C. § 2404	12
7 U.S.C. § 2483	12
7 U.S.C. § 2541	2, 4, 15-19
7 U.S.C. § 2541 (1)	4, 15-16, 18
7 U.S.C. § 2541 (2)	14, 18
7 U.S.C. § 2541 (3)	3, 4, 6, 7, 15-17
7 U.S.C. § 2541 (4)	3, 4, 17, 18
7 U.S.C. § 2541 (5)	14, 18
7 U.S.C. § 2541 (6)	14, 16-19
7 U.S.C. § 2541 (7)	14, 18
7 U.S.C. § 2541 (8)	14, 18
7 U.S.C. § 2543	<i>passim</i>
7 U.S.C. § 2561	10
7 U.S.C. § 2567	19
7 U.S.C. §§ 2901-11	14
17 U.S.C. § 107	1
28 U.S.C. § 1338 (a)	10
35 U.S.C. § 6	9
35 U.S.C. § 271 (e) (1)	1

REPLY BRIEF FOR THE PETITIONER *

Both Asgrow and the Winterboers assert that the plain language of the first sentence of 7 U.S.C. § 2543 compels their interpretation and that the policy arguments offered by the other party cannot be used to rewrite the statute under the guise of statutory interpretation. Only Asgrow is correct. When all of the words in that sentence are given meaning, they compel Asgrow's statutory interpretation as a matter of law.

I. THE ONLY SEED THAT CAN BE SOLD UNDER SECTION 2543 IS THE LIMITED QUANTITY THAT WOULD BE NEEDED TO PRODUCE ANOTHER CROP ON THE SELLER'S FARM

The legal issue presented by the facts of this case is whether Congress intended that a soybean farmer be able to produce forty-five times the amount of PVPA-protected soybean seed that was obtained from the PVPA-certificate owner, and then sell *over twenty-two times* what he purchased in competition with the owner of the variety. See Pet. App. 32a n.2; ASTA Brief 10-15. No statutory scheme of intellectual property protection, particularly one covering a commodity that reproduces itself many times over, would have been designed by Congress with such an immense loophole from infringement.¹

The Winterboers' attempt to cloak themselves in a "centuries-old right of farmers to sell seed to other farmers for seeding purposes" (Resp. Br. 10) ignores that Congress clearly restricted the right to sell PVPA-

* The Petitioner's statement for purposes of Sup. Ct. R. 29.1 appears at Pet. Br. ii.

¹ The other federal intellectual property laws—patent, copyright, and trademark—contain no or only narrow exemptions to an owner's commercial enjoyment of the protected creation. Cf. *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164 (1994) ("fair use" limitations on copyrights in 17 U.S.C. § 107); *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990) (construing limited exemption from patent infringement in 35 U.S.C. § 271(e)(1)).

protected seed for reproductive purposes. Section 2541 lists the infringing acts, which include selling the novel variety and sexually multiplying the variety as a step in marketing it for growing purposes. Pet. App. 40a. Section 2543 provides certain exceptions from infringement for certain sales of seed produced “from seed obtained, or descended from seed obtained, by authority of the owner of the variety for seeding purposes” (hereinafter “authorized seed”). *Id.* at 41a; *see also* Pet. Br. 18 n.10.

The first sentence in section 2543 sets forth the only permissible uses for *reproductive* purposes of protected seed produced from “authorized seed” by one acting without the owner’s authorization. In contrast, the second sentence allows protected seed to be sold for *nonreproductive* uses without any quantitative limitation. Finally, the third sentence imputes notice of infringement to anyone who diverts protected seed to reproductive purposes after purchasing the protected seed in channels usual for non-reproductive uses. In that manner, each sentence in the statute serves a distinct purpose. *See* Pet. Br. 4 & n.4; 27-28.

Only the first sentence of section 2543 is at issue before this Court. Contrary to the Winterboers’ accusations, Asgrow does not rely on a vague policy rationale as a substitute for the clear language of the statute. When this Court construes the language of section 2543 as a whole, *United States v. Morton*, 467 U.S. 822, 828 & n.8 (1984), it can only reach the same conclusion reached by Asgrow and by the Solicitor General—that the quantity of protected seed produced by a farmer that can be sold to others for reproductive purposes is limited to the amount needed by the seller/grower for use “in the production of a crop” on his farm. Pet. App. 41a.

A. The Limit On The Amount Of Seed That Can Be Sold Under Section 2543 Is Set By The First Half Of The First Sentence Of The Section

The Winterboers and the Brief Amici Curiae for Rural Advancement Foundation International, *et al.* (“the RAFI Brief”) incorrectly conclude that there is no quantitative limit on the amount of protected seed that can be saved and sold under section 2543. *E.g.*, Resp. Br. 8, 14-17; RAFI Brief 4, 14. In the initial clause of the first sentence, Congress excepted from the exemption seed production that would constitute sexually multiplying the novel variety as a step in marketing it for growing purposes (section 2541(3)) or using the novel variety to produce a hybrid or a different variety (section 2541(4)). That clause has the effect of limiting the amount of “such saved seed” that can be sold for reproductive purposes under the terms of the proviso in that same sentence. Because section 2541(4) is not implicated here (Pet. Br. 20 n.13), the “such saved seed” in this case is that seed which was produced without infringing section 2541(3), *i.e.*, that quantity of seed that has *not* been sexually multiplied by the Winterboers as a step in marketing Asgrow’s novel varieties for growing purposes.

The Winterboers state that “[t]he reference in the introductory ‘except’ clause to Section 2541(3) does restrict the *purpose* for which a person can save the seed—a farmer cannot save it for the purpose of ‘sexually multiply[ing] the seed as a step in marketing (for growing purposes).’” Resp. Br. 11. The Winterboers err in focusing on the seed produced rather than on the action that produces the seed. In actuality, the first reference to section 2541(3) restricts the purpose for which a person can *produce* seed of a protected variety that is to be saved and later used or sold as seed. *See* Brief for the United States As Amicus Curiae Supporting Petitioner (“U.S. Brief”) 11-14. Thus, if the sexual multiplication that produces the protected seed in question is or becomes a step in marketing the variety for growing purposes, the resulting

seed is excluded by the first reference to section 2541(3) in section 2543 from being within the scope of what can be considered "such saved seed."

When the same word or phrase appears more than once in the same statute, it should be given the same meaning in both places. *E.g.*, *United States Nat'l Bank v. Independent Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2185 (1993). Because the phrase "such saved seed" appears both in the opening clause and in the proviso of the first sentence of section 2543, it must refer to the same quantity of seed.

By operation of the first clause, protected seed cannot be saved if the sexual multiplication that produced that seed was a step in marketing the variety for growing purposes. Thus, the first portion of the first sentence in section 2543 limits the quantity of protected seed that can be within the scope of "such saved seed" to which the remainder of the sentence applies. The proviso in the remainder of the first sentence then specifies the conditions of who can sell and how that limited quantity of "such saved seed" can be sold for use as seed.²

The Federal Circuit erroneously concluded that the initial clause of section 2543 gives a person who has produced seed from "authorized seed" an exemption from all subsections of section 2541 except subsections (3) and (4). *See* Pet. App. 6a, 13a. Instead, that initial clause only limits the quantity of seed that can be saved as "such saved seed," not the conditions under which "such saved seed" can be sold without liability.

² In contrast, the phrase "such saved seed" is not in the second sentence of section 2543 so that sentence authorizes any amount of seed of a protected variety (not just "such saved seed") to be sold for *nonreproductive* purposes, notwithstanding the prohibition against sales in section 2541(1).

B. The Conditions Under Which "Such Saved Seed" Can Be Sold Under Section 2543 Are Set By The Proviso In The First Sentence

The Winterboers assert that the proviso allows any person whose primary farming occupation is the growing of crops for sale for other than reproductive purposes to sell "*any* seed he or she has saved to other farmers similarly situated." Resp. Br. 11-12 (emphasis added). Attempting to support that flawed view, the Winterboers and the RAFI amici devote much effort to showing that there is no quantitative limit in section 2543 as to how much seed can be *saved*. However, their focus on the act of "saving" seed and on whether "saving" equals "marketing" (RAFI Brief 16) is misplaced.

By its express terms, the proviso does not authorize the sale of "*any* seed saved" but only provides the conditions under which "such saved seed" may be sold. That proviso allows only those persons whose "primary farming occupation" is the growing of crops for nonreproductive purposes to sell "such saved seed" to other persons so engaged, provided such sales comply with all applicable state seed laws. Pet. App. 41a. As Judge Newman correctly noted, the "primary farming occupation" phrase only determines which farmers qualify to sell any saved seed at all, not how much seed a farmer may sell. Pet. App. 36a. Moreover, the "such saved seed" referenced in the proviso corresponds to the same limited quantity of seed defined by the first half of the sentence which allows only "such saved seed" to be sold as provided in this section.

The quantitative limitation that Congress provided in section 2543 arises when the producer plans or decides to sell or otherwise market protected seed to others for growing purposes. To the extent that the protected variety has been sexually multiplied as a step in marketing the variety for growing purposes, the first clause of section 2543 excepts that portion of the resulting crop from what

can be saved as the "such saved seed" to which the rest of the first sentence of section 2543 applies. Thus, in practical effect, the statute should cause a rational farmer to limit the amount of his crop that he saves for seed because he will not be able to sell any more for reproductive purposes than the amount he would have needed to produce a crop on his own farm.

The Winterboers argue that the second reference to section 2541(3) in the proviso of section 2543 "contemplates sales by qualified farmers in excess of that necessary to replant the crop in the next season." Resp. Br. 8. However, that latter reference in the proviso only creates an exemption from the provisions of section 2541(3) for sales of the "such saved seed" delimited by the initial portion of the sentence, not for "all saved seed." Thus, the proviso allows "such saved seed" to be sold even though it had been sexually multiplied as a step in having that seed available to sell or market for growing purposes; however, the proviso does not allow *any* seed that is "saved" by a farmer to be sold without regard to the provisions of section 2541(3).

C. The Term "Marketing" In Section 2541(3) Must Be Given Its Ordinary Meaning Which Includes All Acts Of Selling

The Winterboers attack Asgrow's statutory interpretation on the ground that it requires that the meaning of "marketing" for purposes of section 2541(3) be synonymous with the meaning of "selling."³ Resp. Br. 8. However, Asgrow did not equate the two terms nor does Asgrow's interpretation require or depend upon the two terms being given the same meaning. Indeed, Asgrow

³ Both the Winterboers and the RAFI amici also suggest that it does not matter how "marketing" is interpreted because farmer-to-farmer sales are exempted under section 2543. Resp. Br. 24-25; RAFI Brief 15 n.5 & 16-17 n.8. However, such arguments are based on their failure to discern that the proviso only permits sales of "such saved seed," not any seed that is saved.

agrees with the Winterboers that the two terms "have independent meanings" (Resp. Br. 10) and with Judge Rader's personal view that "[s]elling is different from marketing." Pet. App. 29a n.*. However, the terms also are not mutually exclusive.

Rather than construing "marketing" as being restricted only to a specialized subset of selling as did the Federal Circuit, Pet. App. 12a-13a, Asgrow and the Solicitor General properly turned to the common meanings of both terms because no unique definitions were provided in the Act. *Perrin v. United States*, 444 U.S. 37, 42 (1979). In accordance with their ordinary definitions, "marketing" is clearly broader than "selling" and includes all acts and forms of "selling." See Pet. Br. 20-21; U.S. Brief 12-13 & nn.9-10.

When "marketing" is given its ordinary meaning, section 2541(3) thus prohibits any sexual multiplication of a novel variety as a step in marketing the variety for growing purposes, regardless of whether the "marketing" at issue results in a direct sale, an exchange, or a promotion involving the protected seed. For example, sexually multiplying the protected variety in order to distribute samples of it or to trade protected seed for goods or services is prohibited by section 2541(3), even if no direct sale or money transaction is involved. Similarly, all selling falls within the scope of "marketing" for purposes of section 2541(3), regardless of whether the sale or offer for sale is accompanied or facilitated by advertising, sales agents, or extended merchandising or retail activities.

D. Section 2543 Only Limits The Amount Of Protected Seed That Can Be Sold For Reproductive Purposes

The amicus curiae brief of Tanimura & Antle before the Federal Circuit was concerned with avoiding an interpretation of section 2543 that would restrict the amount of protected seed that could be saved in contrast to limit-

ing the amount of saved seed that could be sold. See Tanimura Brief 1-2. According to Tanimura, vegetable farmers may save seed from a single crop in sufficient quantity to meet their planting needs for multiple future years, not just the next one. *Id.* at 5. While Tanimura represented that it had never sold any saved seed to others and had no plans to do so in the future, *id.*, the Winterboers now argue that Asgrow's interpretation of section 2543 would pose grave difficulties for vegetable farmers.

The Winterboers' "crocodile tears" on behalf of vegetable growers are unpersuasive because no such difficulties exist. The first clause of 7 U.S.C. § 2543 does not impose a quantitative restriction on the amount of protected seed that can be saved. Instead, it only imposes a quantitative restriction on the amount of protected seed that can be sold for reproductive purposes. In the absence of any selling (or other marketing) of PVPA-protected seed produced from "authorized seed," section 2543 imposes no direct quantitative limit on the act of saving seed produced by the grower because no protected seed will have been sexually multiplied as a step in marketing the novel variety for growing purposes.

If a vegetable farmer produces a crop from authorized seed and saves enough seed to plant his farm for the next five years, and then actually uses that seed on his farm and/or never sells or dispenses any of the saved seed to others, no liability will result.⁴ On the other hand, a vegetable farmer that habitually saves excess seed for alleged expansion that never happens should be unable to

⁴ While a vegetable farmer may save enough seed for multiple future crops, if that farmer later decides to sell seed to others, section 2543 would restrict the amount that could be sold to the "such saved seed" needed "in the production of a crop" on his farm, *i.e.*, one crop. Resolution of that particular issue is not necessary here because all of the Winterboers' Asgrow seed was sold and because it is not practical to save soybean seed for more than one year.

prove that he has not been sexually multiplying the novel variety as a step in having seed to sell to others. In the latter situation, there will be little doubt that the protected variety had been sexually multiplied as a step in marketing the variety for growing purposes because the farmer was saving more seed than he reasonably needed in order to produce another crop on his own farm. Moreover, the professed concerns about enforcement and proof difficulties (Resp. Br. 35-36) are no different in PVPA cases than for any factual issue routinely tried by courts.

E. There Are No Prior Interpretations Of Section 2543 To Which This Court Owes Deference

The Winterboers' attempt to cite prior judicial support for their position is misleading. No such authority exists. Indeed, the Federal Circuit viewed this case as one of first impression. Pet. App. 4a. Moreover, the opinions cited by the Winterboers from *Asgrow Seed Co. v. Kunkle Seed Co.*, No. 86-3138-A (W.D. La. 1987), *aff'd*, 845 F.2d 1034 (Fed. Cir. 1988), are nonprecedential and only addressed whether Kunkle's "primary farming occupation" was the growing of crops for nonreproductive purposes. That case later concluded with a permanent injunction against the defendant and the payment of damages to Asgrow.

The Winterboers also claim that documents from the Department of Agriculture are entitled to deference from this Court as prior interpretations of section 2543 by the agency charged with administering the PVPA. Resp. Br. 25, 27. However, neither the Department of Agriculture nor the Plant Variety Protection Office ("PVPO") were given any regulatory authority by Congress over the PVPA's infringement provisions.⁵ See 7 U.S.C. § 2326.

⁵ The PVPA is like the patent and trademark laws in these respects. The United States Patent and Trademark Office ("PTO"), by the Commissioner of Patents, has statutory authority to grant and issue patents and register trademarks that meet the statutory requirements. However, the PTO has no jurisdiction or rulemaking

Jurisdiction over infringement lies exclusively in the district courts. See 7 U.S.C. § 2561; 28 U.S.C. § 1338(a).

The Winterboers urge this Court to "assume" that the Department of Agriculture was informed that it could not issue regulations to define what is exempted under section 2543 because such regulations would have conflicted with the plain language of the statute. Resp. Br. 27 (citing JA20). Not only does the cited document not interpret section 2543, it confirms that the Department of Agriculture has no authority concerning section 2543. For that reason, even if the 1973 "interpretation" from a letter by a PVPO Commissioner quoted at Resp. Br. 25 was an agency regulation, it is not entitled to any deference. See, e.g., *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-04 (1979).

The only authorized views of the Department of Agriculture as to the quantitative limits in section 2543 on sales of protected seed are set forth at U.S. Brief 10-21 & n.20, which fully support Asgrow's interpretation. Moreover, the fact that Congress has not clarified the quantitative limits in section 2543 does not show that Congress was aware of, adopted, or ratified the erroneous views of the various commentators that conflicted with the statute. See *Demarest*, 498 U.S. at 190; *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act.").⁶

authority over issues or actions involving the infringement of patents or trademarks. See 35 U.S.C. § 6.

⁶ Congress is progressing with legislation that will amend section 2543 to eliminate any right to sell seed for reproductive purposes with respect to any new varieties protected by PVPA certificates applied for more than 180 days after enactment of the amendments. See Pet. Br. 42-44 & nn.30-31.

F. The Respondents' Other Attempts To Avoid Liability Are Irrelevant

The Winterboers suggest that the various ways of interpreting section 2543 that have been offered or reached at different stages of this case provide evidence that Asgrow's current explanation is incorrect. Asgrow has always asserted that section 2543 limits sales of protected seed to what would be needed to produce another crop on the seller's farm. Admittedly, Asgrow's analysis has evolved over the course of this lawsuit, but so has that of the Winterboers.⁷ Such clarification of legal positions along the path to this Court certainly does not alter this Court's task of determining the proper statutory meaning as a matter of law. See *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("courts are the final authorities on issues of statutory construction").

The assertion at Resp. Br. 32-34 that "brown baggers" do not compete with the PVPA certificate owners is simply false. The American Seed Trade Association provides ample evidence of the disastrous effects that illegal brown bag seed sales have had on the operations and sales of many different breeders producing many different novel varieties. ASTA Brief 10-15. Without question, every bushel of Asgrow seed sold by the Winterboers or other "brown baggers" is a bushel of seed that cannot be sold by Asgrow or its representatives.

In a more curious attempt to avoid liability, the Winterboers claim that their Asgrow seed is inferior and not subject to the same warranties and quality controls as

⁷ Indeed, the Winterboers are still trying to change the undisputed facts. The only evidence before the district court was that the Winterboers sold nearly all of their Asgrow soybeans as seed. They now assert that testimony was "mistaken" and that less than half of their Asgrow crops were sold as seed. Resp. Br. 4 n.3. This belated attempt to avoid liability under the Federal Circuit's statutory construction should be ignored. Moreover, when section 2543 is properly interpreted, that factual revision is also irrelevant.

the seed produced and sold by Asgrow. Resp. Br. 32-33. While their after-the-fact claim of inferiority is a telling admission, it is also irrelevant. Even if true, it does not and cannot excuse their infringement. See, e.g., *Shamrock Technologies, Inc. v. Medical Sterilization, Inc.*, 903 F.2d 789, 792 (Fed. Cir. 1990) (inefficient infringement is still infringement); *Laitram Corp. v. Cambridge Wire Cloth Co.*, 863 F.2d 855, 859 & n.11 (Fed. Cir. 1988). *cert. denied*, 490 U.S. 1068 (1939).

The assertion that the Winterboers' "brown bag" seed sales were "so robust" (Resp. Br. 34) only because there was a shortage of Asgrow's protected soybean seed in the area of Iowa supplied by the Winterboers is also irrelevant. Even if that is proven, a shortage of Asgrow seed cannot excuse or justify the infringement of Asgrow's exclusive statutory rights by the Winterboers. A PVPA certificate gives its owner the right "to exclude others from selling the variety, or offering it for sale, or reproducing it . . . as provided in this chapter." 7 U.S.C. § 2483. Whether or not enough Asgrow seed was available, the very essence of the exclusive rights granted by the Act entitles Asgrow to prevent all unauthorized sales of its protected seed by others.

Even if Asgrow's protected varieties were opened to use by others by the Secretary of Agriculture under 7 U.S.C. § 2404, reasonable remuneration would be due Asgrow. In stark contrast, the Winterboers are selling Asgrow's seed without compensation to Asgrow at all. The PVPA simply was not designed to allow a farmer to sexually multiply a protected variety in order to sell seed in commercial quantities in unfair competition with the certificate owner, nor did Congress intend to provide a vehicle by which traditional farmers would be tempted to become seed dealers in protected varieties.

G. The Policy And Constitutional Challenges To The PVPA Are Misplaced And Meritless

The Winterboers and their amici offer various policy assertions as to why the PVPA should not have been enacted or why the statutory standards for PVPA certification do not justify giving exclusive "patent-like" rights to breeders of sexually-reproduced plants. Resp. Br. 2-3; RAFI Brief 25-28. Such policy attacks on the PVPA are wholly misplaced. The wisdom of the PVPA legislation and the propriety of its standards and provisions are clearly matters to be addressed only by Congress.

In any event, if the differences between Asgrow's PVPA soybean varieties and other available soybeans were truly meager or resulted only from "cosmetic" changes, Asgrow could not sell its PVPA seed at a higher price than that of unprotected seed. Farmers would simply buy or save the seed of the unprotected varieties. Of course, that is not the case at all. Instead, new varieties will be successful in the marketplace because they have significantly higher yields and increased disease resistance. Despite higher initial seed costs, farmers are still able to earn more overall than with the unprotected public varieties.

The Winterboers admit that the demand for Asgrow's PVPA seed was high. Resp. Br. 34. Thus, their current claim that Asgrow's protected varieties lack distinctiveness and are not improvements over existing soybean varieties rings hollow. It is the very success of and demand for the Asgrow varieties that allows "brown baggers" such as the Winterboers to take advantage of that demand by selling "brown bag" Asgrow seed to other farmers.

Finally, the constitutionality of the PVPA need not be addressed. See Brief of Ted Cook As Amicus Curiae In Support Of Respondents, at 5-16. That issue was not raised or considered below nor raised by the respondents in this Court. E.g., *Robertson v. Seattle Audubon So-*

ciety, 112 S. Ct. 1407, 1415 (1992). An amicus curiae cannot expand the issues to be considered. *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Moreover, constitutional issues are to be avoided when resolution of such issues is not necessary for disposition of a case. *In re Snyder*, 472 U.S. 634, 642 (1985). In any event, such challenges are meritless. Indeed, the constitutional authority for the PVPA under the commerce clause is beyond legitimate question. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 118-28 (1942); cf. *United States v. Frame*, 885 F.2d 1119, 1125-27 (3d Cir. 1989) (rejecting commerce clause challenge to the Beef Promotion and Research Act, 7 U.S.C. §§ 2901-11), *cert. denied*, 493 U.S. 1094 (1990).

II. THE NOTICE PROVISION IN SECTION 2541(6) IS APPLICABLE TO ALL SALES OF PVPA SEED PERMITTED UNDER SECTION 2543

The Winterboers claim that giving notice under section 2541(6) is not required when seed is sold in accordance with section 2543, but their conclusory analysis fails to explain how section 2543 "clearly provides otherwise" with respect to the requirements of section 2541(6). Resp. Br. 41-42. As shown by *Asgrow*, the Federal Circuit misconstrued the opening clause of section 2543 as exempting subsections (1), (2), (5), (6), (7) and (8) of section 2541 from applying when seed is sold under section 2543. Pet. App. 13a. Instead, that opening clause only limits the quantity of a person's authorized crop that can later be sold as "such saved seed." Pet. Br. 36; see *supra* section I.A. Thus, the opening clause cannot be the source for an exemption from the notice requirement for sales of "such saved seed."

What the PVPA recognized in the "right to save seed" provision in the first sentence of section 2543 was the pragmatic practice of farmers saving enough seed from their crop to replant their own farms. See Pet. App. 32a. What Congress allowed was the sale of "such saved seed"

when the farmer that saved the seed later had a change of plans and no longer needed that seed to produce a crop on his farm. Under that provision, no portion of a farmer's crop would be wasted but no incentive would be created to cause the farmer to save more seed than would be needed to produce another crop on his farm. However, Congress did not need to exempt all of section 2541 in section 2543, it only needed to exempt those parts of section 2541 that would otherwise foreclose selling the novel variety for reproductive purposes.

A. Congress Only Exempted Sales When It Provided That It Shall Not Infringe Any Right To Sell Such Saved Seed

Under section 2541(1), "to sell the novel variety" infringes the rights of the certificate owner. Pet. App. 40a. That prohibition was negated when Congress stated in the proviso that "it shall not infringe any right hereunder . . . to sell such saved seed." *Id.* at 41a (emphasis added). However, only removing the prohibition in section 2541(1) to selling the novel variety would not have been sufficient to allow sales of "such saved seed." Under section 2541(3), it also infringes to sexually multiply the novel variety as a step in marketing it for growing purposes, which covers producing any protected seed that is later sold. *Id.* at 40a. Thus, Congress negated that prohibition by stating in the proviso that "such saved seed" could be sold "without regard to the provisions of section 2541(3) of this title." *Id.* at 41a. However, that is the only extent to which Congress nullified application of section 2541 to sales of "such saved seed" made under the first sentence of section 2543.

The Solicitor General asserts that the portion of the proviso in section 2543 stating that "it shall not infringe any right hereunder" for a qualified farmer to sell "such saved seed" to other farmers for reproductive purposes means that sales of "such saved seed" are not acts of infringement under any subsection of section 2541, in-

cluding subsection (6). U.S. Brief 24. However, that construction violates the fundamental canon that statutes are not to be interpreted in a manner that would render part of their language inoperative, superfluous, or meaningless. *See, e.g., United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992); *Freytag v. Commissioner*, 111 S. Ct. 2631, 2638 (1991).

If it were correct that the phrase "it shall not infringe any right hereunder" in the proviso of section 2543 meant that no subsection of section 2541 applies when "such saved seed" is sold in accordance with the proviso, Congress would have had no reason to include the "without regard to the provisions of section 2541(3)" clause in the same proviso. Even without that second reference to section 2541(3) in the proviso, any violations of section 2541(3) arising out of the sale of "such saved seed" would be excused along with all other violations of section 2541 by the "it shall not infringe any right" language. Thus, in order to avoid rendering the "without regard to the provisions of section 2541(3)" phrase in the proviso superfluous, the phrase "it shall not infringe any right hereunder . . . to sell such saved seed" must be construed as creating a limited exemption only for the sales of "such saved seed" expressly authorized by the proviso. Pet. App. 41a (emphasis added).

Sales of "such saved seed" under the proviso can be made "without regard to the provisions of section 2541(3)" because the proviso states so expressly. Pet. App. 41a. No other subsection is listed. However, even though Congress did not include section 2541(1) in that clause, its prohibition against *selling* the novel variety is not violated by sales made in accordance with section 2543 because the proviso expressly states that persons whose primary farming occupation is growing crops for nonreproductive purposes may "sell such saved seed" in accordance with state law. *Id.* (emphasis added). In that manner, Congress nullified sections 2541(1) and 2541(3) to the extent they would otherwise prevent sales of "such

saved seed" under section 2543, but kept the rest of section 2541, including subsection (6), applicable to all sales of PVPA-protected seed, including any sales of "such saved seed" permitted by section 2543.

B. Congress Did Not Allow Or Intend For Any Protected Seed To Be Used To Produce A Hybrid Or Different Variety

Asgrow submits that the proper interpretation of section 2543 with respect to the "notice" issue can be illustrated by tracing Congress' treatment of section 2541(4) in contrast to its treatment of section 2541(3). Paralleling the first reference to section 2541(3), the reference to section 2541(4) in the opening clause of section 2543 means a person may not save seed produced by him if such action might constitute an infringement of subsection 2541(4), *i.e.*, it would be used for producing a hybrid or different variety therefrom. Thus, just like sexually multiplying the variety as a step in marketing for growing purposes is excluded as a reason for producing seed to be saved under section 2543, saving seed for use in producing a hybrid or a different variety is prohibited as well.

In the proviso, Congress then allowed "such saved seed" to be sold by and to certain farmers "without regard to the provisions of section 2541(3)." Pet. App. 41a. By so doing, Congress permitted "such saved seed" to be sold under certain conditions even though it had been sexually multiplied as a step in marketing the variety for growing purposes. Pet. Br. 24-26. However, there is no "second" reference to section 2541(4) in the proviso to parallel the second reference to section 2541(3). Congress must have done that for a reason. Based on the express exemption of sections 2541(3) and 2541(4) in the first clause and the lack of a second reference to section 2541(4) in the proviso, Congress clearly did not intend for any "such saved seed" to be sold for use in producing a hybrid or different variety. *See Keene Corp.*

v. United States, 113 S. Ct. 2035, 2040 (1993) (where Congress includes language in one section of a statute but omits it in another, Congress is presumed to act intentionally).

Viewed in that light, the interpretation offered by the Solicitor General would clearly frustrate Congress' design to prevent a protected variety from being used in producing a hybrid or a different variety. If that construction were accepted, "such saved seed" could lawfully be sold for use in producing a hybrid or different variety, even though Congress declined to state explicitly that any seed sales made under the proviso could be made without regard to the provisions of section 2541(4). Congress cannot be presumed to have created a statutory exemption by implication where it declined to do so expressly. *See, e.g., Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989). Moreover, that reasoning applies with equal force to show that subsections (2), (5), (6), (7) and (8) of section 2541 also are not exempted. *See* Pet. Br. 33-34.

C. Section 2543 Should Be Narrowly Construed To Further Congress' Purpose Of Requiring Notice In All PVPA Seed Transactions

Exemptions from comprehensive statutory schemes should be narrowly construed in light of the plain meaning of the statute and the intent of Congress. *See, e.g., Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Subsections (1) and (6) are distinct provisions which foreclose different acts of infringement which are separate and independent violations of a certificate owner's rights. *See* Pet. Br. 34 & n.26. Thus, the mere fact that Congress authorized certain sales of "such saved seed" in section 2543 does not lead to the conclusion that Congress intended for the protected seed involved in such sales to be dispensed without notice, particularly where the lack

of notice on such sales would cause immense problems in PVPA compliance and enforcement.

If notice were not required on sales of "such saved seed" under section 2543, an "innocent" farmer that purchases PVPA seed sold without section 2541(6) notice might later violate the owner's PVPA rights without knowing that such rights attached to his seed. If section 2543 is interpreted so that sales of "such saved seed" are not required to be accompanied by section 2541(6) notice, a bona fide purchaser of such seed may be subject to liability upon receiving notice of the owner's rights despite there being no requirement that such notice be given in the first place. Narrowly construing the proviso in section 2543 so as to provide only the exemptions from section 2541 that are needed to allow sales of "such saved seed" between qualified farmers is consistent with the language and policy of the PVPA, and would prevent the "innocent" farmer problem because all persons would get notice (or the seller would be liable for omitting it).

Asgrow agrees with the respondents and the United States that sales of "such saved seed" under section 2543 are not authorized by the certificate owner. Asgrow further agrees that section 2567 should not foreclose infringement remedies against a purchaser of PVPA seed sold under section 2543. Asgrow's concern in this regard was that the last sentence of section 2567 might prompt district judges not to enforce an owner's PVPA rights against farmers claiming not to have received actual notice of such rights. Any potential problems of proof or difficulties in balancing the equities between a PVPA owner and an "innocent" purchaser will be avoided if *all* PVPA seed—whether authorized, saved, or brown bag—is required to be transferred with section 2541(6) notice. Asgrow submits that is exactly what Congress provided in the Act.

CONCLUSION

For the foregoing reasons, and those in the petitioner's opening brief, this Court should reverse the decision of the Federal Circuit.

Respectfully submitted,

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